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CHARLES ELMORE COOPLEY
CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1944

No. [REDACTED]

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ARMOUR AND COMPANY, a Corporation,
Petitioner,
against
ADAM WANTOCK and FRANK SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

✓ CHAS. J. FAULKNER, JR.,
✓ JOHN POTTS BARNES,
✓ FREDERICK R. BAIRD,
✓ R. F. FEAGANS,
✓ PAUL E. BLANCHARD,
Attorneys for Petitioner.

4301 South Racine Avenue,
Chicago, Illinois.

Dated at Chicago, Illinois, May 2, 1944.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION.

The Petitioner, Armour and Company, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled the Circuit Court), entered in the above cause on February 5, 1944.

The opinions of the Courts below; the statutes involved; and the specific errors complained of, are fully

set forth in the accompanying record, and in the brief contemporaneously filed in support of this Petition.

The decision of the Circuit Court was a majority decision of a Circuit and a District judge, with one Circuit judge dissenting.

Summary statement of the matters involved.

This case involves the interpretation and application of the Federal Fair Labor Standards Act (Title 29, U.S.C.A.), and particularly of Sections 203(g), 203(j), and 207(a) thereof, to a class of employees, and to a nature of employment, not heretofore involved in any proceeding wherein this Court has considered or construed that Act.

The facts involved in this proceeding were stipulated (R. 8-16), or established by oral testimony (R. 17-26) at the request of the District Court (R. 7). In either case they are admitted or undisputed.

Petitioner operates a soap factory in Chicago, Illinois, in which it produces goods for shipment in interstate commerce. A full staff of production and maintenance workers, including watchmen (such as were considered by this Court in *Kirschbaum v. Walling*, 316 U. S. 517, and in *Walton v. Southern Package Corporation*, decided by the Supreme Court, Jan. 3, 1944), are employed at that plant (R. 3, 5).

This suit was brought by two employees who were not within any of the classifications above named, i.e. production workers, maintenance workers, watchmen or regular plant protective employees. They were professional firemen (in the sense of fire fighters), (R. 8-10) who supplemented the fire protective service of the City Fire Department.

No production or operating executive of the Company

had any voice in the establishment or withdrawal of this additional protective service (R. 20). The insurance executives of the Company had seen fit (for reasons explained of record), to supplement the protective service of the City Fire Department, by establishing and maintaining a private fire engine and a fire house, in which the original respondents were employed (R. 15, 16).

Two questions were presented. Were the men covered by the Act at all? If so, were they "employed" within the meaning of the Act during all of the time they were in residence at the fire hall?

These firemen are in residence at the fire hall every alternate 24 hours. (No question arose as to the 24 hours when they are not so in residence.) Their 24-hour period in residence begins at 8 A.M. at which time they "punch in" on the time clock. For the next 9 hours, with one-half hour off for lunch, they occupy themselves solely with the repair and maintenance of the Company's fire fighting apparatus. At 5 P.M. they "punch out" on the time clock, and retire to the fire hall (R. 12).

After "punching out" on the time clock, and retiring to their quarters in the fire hall, the men may prepare and eat their evening meal on the facilities provided by the Company in the fire hall, or they may, if they chose, leave the premises at staggered intervals and eat in a nearby restaurant (R. 19). Following their meal they could retire at once if they chose, in beds provided by the Company, in the fire hall. If they preferred they could (and did) play cards, listen to the radio, read, lie down, or occupy themselves as they pleased, later retiring whenever they elected to do so (R. 12).

During this 15-hour interval the patrolling and watching of the plant was done by a crew of night watch-

men who came on duty at 5 P.M. The firemen had no share in the responsibility of patrolling and protecting the plant property. In fact, during this 15 hours, the firemen were *barred from the plant* unless a watchman, detecting smoke or other evidence of fire, or some defect in fire-fighting apparatus, called them (R. 13).

Over a period of several years, such calls occurred during this 15-hour controversial period, once every 4.3 weeks for one of the respondent firemen, and averaged 57 minutes per call; and once every 3.36 weeks, and averaged 47 minutes per call for the other (R. 28, 29).

The respondents claimed that they were covered by the Act, and that the entire 24-hour period of residence in the fire hall was time during which they were "employed" within the meaning of the Act. The Company denied coverage, but contended that the men were "employed" only for the $8\frac{1}{2}$ hours spent each alternate day in servicing and maintaining the fire-fighting apparatus, plus all time spent in responding to the rare fire calls made by the night watchmen. Under respondents' theory the men were "employed," alternately 3 and 4 days per week of 24 hours each, or 72 and 96 hours per alternate week,* for which overtime was claimed for all hours over the maximum permitted by the Act. Under the Company's theory the hours "employed" were, in alternate weeks, $3 \times 8\frac{1}{2}$ hours, and $4 \times 8\frac{1}{2}$ hours per week, plus any time spent in answering the rare calls of the night watchmen; and (if the men were covered by the Act), there was no weekly "employment" beyond the 44, 42 or 40 hours employment permitted by law without payment of overtime.

The District Court held that the firemen were cov-

* In the early portion of the period involved, the alternating shifts were 48 hours in residence, and 48 hours off. This produced 2 weeks of 96 hours in residence followed by two weeks of 72 hours in residence. Only the alternate 24-hour basis "on" and "off" is discussed here in the interest of clarity and brevity.

ered by the Act; and that the portion of the 15-hour period spent eating and sleeping was not time during which the men were "employed" (R. 7). The Court directed a further hearing after which the District Court held that 8 of the 15 controversial hours (covering the evening meal hour, and 7 of the 15 hours covering the average sleeping time), were not hours of employment under the Act. But the 7-hour period spent at cards, at the radio, reading, etc., was held to be time employed. (R. 29).

The Company appealed to the Circuit Court. There was no cross appeal, so the obvious error inherent in the District Court's decision, allowing an employee to control his employer's liability by reducing his own hours of sleep, is not here. Because of this limitation, the Circuit Court's affirmance of the District Court involves only the basic coverage of the Act, and, if covered, the status of the men during only 7 of the 15 hours originally in dispute,—the 7 hours spent at reading, playing cards, listening to the radio, etc.

The basis for jurisdiction of this court to review the judgment in question.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347 (a) of Title 28, U.S.C.A. (quoted in full in appendix A (1) hereto, page 11).

2. This Petition was filed in this Court within the time required by the first paragraph of Section 350, Title 28, U.S.C.A. (quoted in full in appendix A (2) hereto, page 11). The decision of the Circuit Court was made February 5, 1944. (R. 42-45) This Petition was filed May 2, 1944, less than three months after the entry of the decision.

3. This proceeding involves the interpretation and

application of a statute of the United States, viz., The Fair Labor Standards Act, and particularly Sections 203(j), 203(g), and 207(a). Title 29, U.S.C.A. (quoted in full in appendix A, page 31 of the brief filed herewith.

4. The cases believed to sustain the jurisdiction of this Court are:

Opp Cotton Mills, Inc. v. Wage and Hour Administrator, 312 U.S. 126.

Kirschbaum v. Walling, 316 U.S. 517.

Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88.

Overstreet v. North Shore Corp., 318 U.S. 125.

Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123, Case No. 409, decided Mar. 27, 1944.

The questions presented.

1. Conceding the coverage of night watchmen by the Act, are the services of fire fighters, who produce no goods; who maintain no machinery or apparatus "necessary" to any such production; who provide no watching or protective service; who are *not permitted* within the confines of the plant save by permission of the watchman in charge; whose sole function is to supplement the protection of the City Fire Department in an emergency; also covered by the Act?

2. If so covered, are such employees "employed" (defined in the Act as being "suffered or permitted to work"); while exclusively engaged in any occupation they may select, such as reading, playing cards, listening to the radio, lying down, pitching horseshoes, eating when and where they please, and sleeping when, and as long as they please?

Special and important reasons for review of the decision.

1. The decision of the Circuit Court is in conflict with the recent decision of the Circuit Court of Appeals for the 5th Circuit, viz., *Skidmore v. Swift and Company*, 136 Fed. (2d) 112, (certiorari denied Oct. 11, 1943, U.S.; 88 L. Ed. Adv. op. 36) wherein that Court held that privately employed resident fire fighters were not "employed" within the meaning of the Act, while playing cards, listening to the radio, or performing no service of value to their employer. The decision of the Circuit Court is also at variance with the decision of the same Circuit Court of Appeals in *Super-cold Southwest Co. v. McBride*, 124 Fed. (2d) 90.

2. The decision of the Circuit Court is of a Federal question, and is in conflict with the decision of this Court in *Tennessee Coal I. & R. Co. v. Muscoda Local No. 123*, Case No. 409, decided Mar. 27, 1944, wherein this Court held (Emphasis supplied):

"We cannot assume that Congress here was referring to work or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required by the employer* and pursued necessarily and primarily for the benefit of the employer and his business."

3. The decision of the Circuit Court is of a Federal question and is in conflict with the decision of this Court in *Kirschbaum v. Walling*, 316 U.S. 517, in that the Circuit Court assumes that all employees of an employer who is engaged in interstate commerce, are covered by the Fair Labor Standards Act, unless specifically exempted therefrom by the Act.

4. The Circuit Court has ignored and refused to apply the rules and regulations of the Federal administrative agency charged with the enforcement of the Act, with-

out stating any reason therefor, or without pointing out any respect wherein such rules and regulations are unlawful or incorrect.

5. The decision of the Circuit Court is of a Federal question and is in conflict with the decisions of this Court in *Kirschbaum v. Walling*, 316 U.S. 517; in *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88; and in *Overstreet v. North Shore Corp.*, 318 U.S. 125, in that it extends the coverage of the Act to employees who are not "indispensable" to the production being carried on in the plant; who have no "close and immediate tie" with the process of production, and who are not an "essential part" of it; and whose duties are not such that production employees "could not engage in the production of goods for commerce" without the service rendered by the employees in question.

6. The Circuit Court has decided an important question of Federal law which has not been, but should be, decided by this Court. We quote from the decision of the Circuit Court (Emphasis supplied) :

"It seems to us that the question is one *which only the court of last resort can answer finally*, and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court."

This Company employs professional fire fighters having no duties in connection with production of goods, at several plants other than soap plants. The practice of reducing insurance costs by the employment of such firemen is a common practice in American industry. With existing conflict in the decisions of the Circuit Courts of Appeal, no such employer can decide whether or not to continue maintenance of his fire department; or what the expense of such continuance will be; or whether any readjustment of hours can be made which will econom-

ically permit the continuance of that department; until this Court decides the two questions presented here.

In the accompanying brief, petitioner has further amplified each of the foregoing special and important reasons for review.

Conclusion.

In the interest of brevity, and in compliance with the Rules of this Court, Petitioner does not here set forth in detail all the points that will be used at the argument of this case on the merits, should the writ prayed for be granted; nor all the contentions to be advanced in support of such points; but in compliance with Rule 38, Paragraph 2 of the Rules of this Court, requiring all issues upon which decision is requested be stated herein, Petitioner here refers to and incorporates into this Petition, by reference, all of the matters presented in its "Statement of Points" on appeal to the Circuit Court (R. 33), with the same force and effect as if set forth in detail. Summarized, they are:

1. Are the respondents in the Court below covered by the Fair Labor Standards Act?
2. If covered, are they "employed," i.e. being "suffered or permitted to work" within the meaning of the Act during intervals when no service of the employee of any kind is being rendered, and when they are free to occupy themselves as they desire?

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decision and decree of the

United States District Court of the Northern District of Illinois, Eastern Division, and the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court shall seem just and equitable.

Most respectfully submitted,

CHAS. J. FAULKNER, JR.,

JOHN POTTS BARNES,

FREDERICK R. BAIRD,

R. E. FEAGANS,

PAUL E. BLANCHARD,

*Attorneys for Petitioner,
Armour and Company.*

4301 South Racine Avenue,
Chicago, Illinois.

Dated at Chicago, Illinois, May 2, 1944.

APPENDIX A(1).

"Section 347. (Judicial Code, section 240, amended.) Certiorari to circuit court of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit court of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

APPENDIX A(2).

"Section 350. Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari

No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."